IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 574

ALAN FLOREA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Alan Florea, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on July 22, 1970.

Opinion Below

The United States Court of Appeals for the Second Circuit affirmed the judgment entered against petitioner, Alan Florea, and his co-defendants Paul M. Kaufman, Steven Burns and Irving Garber, in the United States District Court for the Southern District of New York. This opinion of the Court of Appeals has not yet been officially

reported; a copy thereof is appended to this petition as Appendix A.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on July 22, 1970. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Counsel for petitioner, Alan Florea, has been informed that co-defendants Kaufman, Burns and Garber intend to petition for certiorari and that Burns and Kaufman have moved in this Court for an extension of time in which to file their petitions. It is respectfully requested that, in the interest of judicial economy, the petitions for certiorari be considered together and that this Court defer action on this petition by Alan Florea until receipt of the remaining petitions. Petitioner, Florea, has been placed on unsupervised probation and is prepared to pay the $1,500 fine imposed on him. He is not in the securities business or in any business which requires governmental licensing. Accordingly, the government cannot be prejudiced by any delay in consideration of his case.

Questions Presented

1. May a conviction for conspiracy to violate 15 U.S.C. §77q(a)—the sale of securities by fraud—stand in the absence of substantial evidence that Florea knowingly participated in a scheme to sell Donbar to the public by fraudulent misrepresentations or omissions to state material facts?

2. May a conviction for conspiracy to violate 15 U.S.C. §77q(a) stand in the absence of substantial evidence of Florea's intent that the mails be used, and in the face of the Trial Court's refusal to charge that proof of such intent was essential to the Government's case?

3. In a trial for conspiracy, may the Trial Court refuse, over objection, to instruct the jury that the requisite overt act must be in furtherance of the conspiracy alleged?

4. Is reversal required where Florea was prevented from cross-examining the crucial witness against him (who was not indicted in Donbar), *inter alia*, as to whether the witness had told the Government he would cooperate if he were not indicted in Donbar?

5. May a series of documents, prejudicial to Florea, reporting past events and not prepared in furtherance of the conspiracy, be admitted for the truth of the matters asserted therein so as to prove a hotly contested issue?

6. May an unorthodox, unkempt and ill-kept record satisfy the business-records exception to the hearsay rule: (i) when many of the significant entries were concededly not kept in the ordinary course of business, and (ii) when all the entries were from random hearsay sources, most of them unidentified, and made for a tax-cheating scheme that destroyed the document's reliability?

Statute Involved

Title 15, U. S. Code:

§77q. *Fraudulent interstate transactions*

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Statement of the Case

Florea was convicted on July 29, 1969, of conspiring, in violation of 18 U.S.C. §371, to sell securities by fraud in violation of 15 U.S.C. §77q(a), after a 30-day trial and 3 days of jury deliberations. He was sentenced to imprisonment for 4 months, the execution of which was suspended, and he was placed on unsupervised probation for 2 years and fined $1,500. Florea was named only in the conspiracy

count of the 17-count indictment. No substantive crimes were charged against him.

The Government's theory was that Florea was part of a conspiracy to retail Donbar Development Corporation stock to the general public by fraudulent omissions to state material facts during the spring of 1963 (2761, 2763-5). Florea left the securities business in mid-1963. The indictment was returned on June 3, 1968—5 years later.

Viewing the evidence against Florea in the light most favorable to the Government, the failure of proof was total. There was no testimony inculpating Florea in an agreement to sell Donbar to anyone, let alone to retail Donbar to the general public; nor was there any testimony linking Florea to any agreement as to what any prospective purchaser should or should not be told—the *sine qua non* of an agreement to sell securities by fraud.

The testimony against Florea was that he agreed to find brokers who would participate in the purchase of Donbar in an effort by the participating brokers to aid Kroll and Binstein to corner the market and to cause the price to rise. Nothing was said to Florea about fraudulent retail sales to the general public by such participating brokers—the gravamen of the case. The facts recited as to Florea in the opinion below relate only to purchases by participating brokers and payments received by Florea for such purchases.

According to the Government's case, Kroll (who died prior to the indictment) and Binstein (the principal Government witness), the architects of the conspiracy, met in late April or early May of 1963 (103-4). Kroll asked Binstein to find brokers who would participate in his plan by

purchasing Donbar from short sellers in return for cash compensation for every share they bought (110).

Prior to Binstein's next meeting with Kroll after Kroll's return from Florida (111), and a day or two after Binstein's initial meeting with Kroll (134), Binstein told Florea about "the proposed corner" and "run up" (132). The "run up" referred only to the rise in price Kroll expected to result from his buying for cash in the open market. Nothing was said about selling stock to the public at a price raised by undisclosed manipulative devices. Not a word was said about selling by brokers who were to get undisclosed compensation for their selling efforts. And, nothing was said about what any purchaser of Donbar should or should not be told.

Giving full credence to Binstein's testimony, the plan described to Florea was one to buy Donbar for the purpose of cornering the market and catching the professional short sellers. Indeed, after the foregoing testimony, repetitive questioning by the Government and the Court as to what Binstein told Florea cast serious doubt even upon this limited testimony. After answering that "The *brokers* were told to buy the stock . . ." and that he did not believe he had said even this to Florea in so many words, upon being repeatedly pressed by the Court, Binstein said that it was the "substance" of what he had told Florea (148-9).

To assist Florea in persuading the participating brokers to purchase Donbar, Binstein said: "I also gave to Mr. Florea a package containing write-ups and financials of Donbar, that I obtained from Mr. Kroll at that first meeting, which described in detail the position of the company, and had quite a few write-ups that appeared in magazines.

and well-known periodicals in the New York area concerning its role in the interracial housing field" (132).

Binstein gave Florea 4 or 5 articles from local newspapers, e.g., The Washington Post and The New York Post (495), which lauded the activities of Donbar in the field of interracial housing and recreation, and Binstein praised the company to Florea (496). The financials that Binstein gave Florea showed an increase in Donbar's overall cash position and an increase in its operations and revenue (496).

Binstein's subsequent testimony about Florea contradicted even the limited testimony laboriously elicited by the Court at pages 148-9 on which the opinion below relies. Testifying about his conversations with Kutlow—innocent as to Kutlow—Binstein said they were the same as his discussions with Florea with one insignificant exception. Asked what he had said to Kutlow, Binstein testified:

> "Told him of my association with Kroll and his contemplated scheme to corner the market, and one of the ways that he would be doing this would be through the purchase of stock through nominee accounts in hopes and expectations of catching the shorts, and that he was a man that could be trusted, and any orders put in by him I could guarantee would be met, in other words, would be paid for in full by Mr. Kroll, and that I was offering to Mr. Kutlow the opportunity to have this commission business" (458).

When Binstein was asked whether Kutlow had his accounts buy the stock, he said that it was "completely false", and that nominee accounts were given to Kutlow, but the stock was not to be bought for Kutlow's clients. According

to Binstein; Kutlow received only standard brokerage commissions (458-9). Binstein admitted having testified before the grand jury truthfully to the best of his ability that he told Kutlow "the same as [he] told Mr. Florea" (460-2).

Redirect examination of Binstein by the Government confirmed Binstein's original testimony as to the restricted non-conspiratorial nature of what he had told Florea. After Government counsel asked: "Could you tell us what you asked Mr. Florea to do?", the Court inquired: "Was there any distinction that you can recall in the instructions given by you to these gentlemen just mentioned?" (878). After Binstein said there was, the Court asked: "Tell us what those distinctions are that you recall in those instructions" (878). Thereupon Binstein answered:

> "Mr. Kutlow at Eastman Dillon was asked to either buy or sell stock in Donbar for [Kroll's] nominees.
>
> "Mr. Florea was asked to obtain brokers who would *buy* stock in Donbar in return for extra cash compensation." (878).

The Government's direct case established that Florea was not invited by Binstein to participate in a conspiracy to sell stock to the public by fraud. The opinion below refers to Binstein's testimony that Florea introduced him to the following conspiratorial brokers: Seigenfeld, Dietz Securities, and Harris Claire. Obviously the jury found that Seigenfeld, who did not retail Donbar to the public but sold only to 2 close relatives, was not a conspiratorial broker, because it acquitted him. As for Dietz Securities, the opinion below makes it clear that Florea claimed compensation of Binstein for "Dietz buying", and not selling.

Binstein said he himself got in touch with Dietz and outlined Kroll's plan (1367). According to Binstein, Florea had introduced Binstein to Dietz in November or December 1962, prior to Donbar, and therefore felt he was entitled to payment for the "participation Dietz Securities had in *buying* the stock" (165). Because it was a prior unrelated introduction, the payment to Florea was "slight" (165). As Binstein said later on, a small payment was made "shortly after Dietz *purchased* securities" (484). And in speaking of Florea's alleged examination of Gov. Ex. 1, Binstein did *not* say Florea took an interest in *sales* by the participating brokers. On the contrary, Binstein said, "He [Florea] wanted to see what *buying* was done by whom" (164).

Gold's testimony was that "Florea was claiming compensation for Dietz *buying*", because "he had introduced Dietz to Binstein" (1561). She said Florea claimed Binstein owed him money "for putting certain *buying* into Donbar, although I never actually saw him get paid" (1557).

As for Harris Claire, although Binstein testified that the introduction was made by Florea, that Florea set up the meeting between the Harris Claire principals (Claire, Winslow and Summers) and Kroll and Binstein, and that Claire said he got Binstein's name from Florea (493, 498-9, 500-501), the evidence on the subject, most of which was presented by the Government, was overwhelmingly to the contrary and the opinion below recognizes it. See the testimony of the three Harris Claire principals, which makes it perfectly clear that Florea had nothing to do with the introduction or the meeting (e.g.: 1394, 1402, 1467-9, 1471-5, 1743-5, 1747, 2448, 2467-8). Indeed, Winslow identified Seigenfeld as Florea (1477-8).

From Binstein's own mouth it is clear that his inculpation of Florea was caused by his desire to get money from Kroll. In discussing this first meeting, which Binstein claimed was set up by Florea, Binstein said that at his first meeting with Claire, Summers, Winslow and Kroll he explained to Kroll that he had been introduced by Florea and had to give Florea a percentage (153-5). Lest there be any doubt, corroborating Claire who said he first heard of Donbar in his lawyer's office (1743), the co-defendant Kaufman testified that the Harris Claire introduction was made by his law partner (2827).

By the end of May—and beyond the cut-off date of the Statute of Limitations, June 3, 1963—the plan to corner Donbar had failed. The price had fallen to about $3 (Gov. Ex. 73). There had been "back-dooring" and lying by the participating brokers (232-6, 245), that is, they were selling the shares they were supposed to be holding (146-7). The Government argued that the cornering plan failed and that there was a new agreement to sell Donbar to the public in return for pay-offs (265-6; 5137).

Binstein testified about a meeting he had with Kroll and Kaufman in late May 1963 to the beginning of June 1963 (244). Kroll "was not satisfied with what was taking place". Kaufman told Kroll "he was doing it all wrong; it should be done through him, Mr. Kaufman; and he, in turn, would protect Mr. Kroll from all the pitfalls of back-dooring and lying and everything that he suspected was taking place by the brokers" (244-5). According to Binstein a new plan was formulated, involving the retailing of Donbar by Burns (245-6). The old agreement (to buy and hold) had terminated at a date which is statute-barred—prior to June 3, 1963—and Florea had nothing to do with the new agreement to retail to the public.

REASONS FOR GRANTING THE WRIT

POINT I

The affirmance of Florea's conviction in the absence of substantial evidence that he knowingly participated in a scheme to sell Donbar to the public by fraudulent misrepresentations and omissions is contrary to the teaching of this Court.

Citing *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), the opinion below correctly states that the evidence must be viewed most favorably to the Government. However, the Court of Appeals ignored what this Court said in *Glasser* immediately prior thereto: "The verdict of a jury must be sustained if there is substantial evidence . . . ". In the absence of substantial evidence, no issue of credibility is presented for the jury's consideration.

Contrary to the opinion below, Florea does not contend that the Government was required to prove he was involved "in all phases of the conspiracy". On the contrary, Florea contends that, taken most favorably to the Government, there is no substantial evidence—indeed no evidence at all—that he knowingly participated in a conspiracy to retail Donbar to the public by fraud—the charge in the indictment and the theory of the Government's case at trial.

Count One charges Florea in paragraphs 3(c), 3(m) and 3(n). With respect to paragraph 3(c) there was no proof against Florea with respect to the offer or payment of secret compensation to securities salesmen for the purpose of attempting to induce others to buy Donbar. With respect to paragraph 3(m) there was no proof against

Florea with respect to the buying and selling of Donbar through nominee accounts to manipulate the price. Indeed, Binstein's testimony was to the contrary when he distinguished the roles of Kutlow and Florea. With respect to paragraph 3(n) there was no proof that Florea made any fraudulent representations or omissions in the offer or sale of Donbar.

Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it. *United States* v. *Peoni*, 100 F.2d 401, 403 (2d Cir. 1938). Florea was not shown to have knowledge of the agreement charged, to have adopted it, and to have acted in furtherance of it. *United States* v. *Andolschek*, 142 F.2d 503, 507 (2d Cir. 1944). The jury was improperly permitted to convict on a theory the Government did not prove as to Florea —the fraudulent retailing of Donbar to the general public.

The Government's evidence, even if only the most incriminating aspects are selected, does not establish Florea's complicity in any crime. The Government established, at most, two separate agreements: (1) A statute-barred agreement, not criminal in any case, to corner the market. The indictment does not charge a conspiracy to corner the market in Donbar, which Congress has not made criminal although it has made criminal a conspiracy to corner the market in a commodity. 7 U.S.C. §13. Nor does the indictment charge a conspiracy to manipulate the price of Donbar, on which the opinion below relies. 15 U.S.C. §77i. (2) After that failed, a separate agreement to raise the price of Donbar so that the accumulated inventory could be publicly sold at a profit. It is beyond dispute that Florea was not in any way involved in the second agreement.

POINT II

The affirmance of Florea's conviction in the absence of substantial evidence of his intent that the mails be used as part of the conspiracy, and in the face of the Trial Court's refusal to charge that proof of such intent was essential to the Government's case mandate reversal.

This point raises two related but distinct errors concerning an essential element of the conspiracy—Florea's intent to use the mails. The first is the Government's failure of proof; and the second is the Court's refusal, over exception, to charge. Either error standing alone requires reversal.

At trial the Government advised the Court that the use of the mails was the sole jurisdictional means on which it relied, and the Court accordingly observed:

> "The only thing we are concerned with is the mail, nothing else" (4813).

Unfortunately for Florea and prejudicially as to him (he was named only in the conspiracy count and not in the substantive counts), the Court's only clear instruction on the required use of the mails was restricted to the substantive counts (4757-8, 4859). In instructing the jury at great length on the essential elements of the alleged conspiracy, the Court made only the briefest equivocal reference to the required jurisdictional means, saying that in order to convict, the jury must find that a defendant was aware of a scheme to sell Donbar to the public "by use of the mails *and perhaps otherwise*" (4720) (emphasis supplied).

Timely exception was taken to the inadequacy of this instruction (4812-13). The Court agreed with counsel's objection, but erroneously believed the instruction had been clarified and amplified after the luncheon recess (4813). However, counsel's observation that the corrected instruction related only to the substantive counts (4813) was correct (4757-8). Nevertheless the Court erroneously refused to instruct the jury that:

> "... it must be part of that conspiracy that the jurisdictional means be used" (4814).

Florea's conviction must also be set aside by reason of the Government's failure to prove an essential element of its case as to him—intent that the mails be used as part of the alleged scheme to defraud. Nothing in the Government's proof links Florea to any intended use of the mails, and the opinion below fails to recite any. Although it is not necessary to prove intent to use the mails with respect to substantive violations, Loss writes:

> "This is not true of the separate offense of conspiracy to violate the mail fraud statute or the SEC fraud provisions: In proving a conspiracy it is essential to establish intent with respect to every element of the conspiracy, one of which is the use of the mails. *United States* v. *Cohen*, 145 F.2d 82, 91 (2d Cir. 1944), *cert. denied*, 323 U.S. 799 (mail fraud statute)." 3 LOSS, Securities Regulation 2d Ed., p. 1523, note 13.

In *Cohen*, cited by Loss, Judge Learned Hand found that there was in fact evidence of such intent sufficient to sustain the conspiracy conviction. Citing his prior opinion in *United States* v. *Crimmins*, 123 F.2d 271, Judge Hand noted:

> ". . . a conspiracy differs from a 'scheme' in that, being an agreement, the parties must have agreed upon all elements of the crime—including the use of the mails." 145 F.2d at p. 91.

See also the opinion of Judge Learned Hand in *United States* v. *Sherman*, 171 F.2d 619 (2d Cir. 1948), reversing a conviction of two defendants for conspiring to steal and conceal goods stolen from interstate commerce:

> "So far as concerns the second count—receiving—it was enough if they knew that the bales had been stolen, for it was not necessary that they should also know them to have been stolen from foreign commerce. On the other hand, we held in *United States* v. *Crimmins* and *United States* v. *Bollenbach* [147 F.2d 199 (2d Cir. 1945)] that such a scienter is necessary in a prosecution for conspiracy . . . ". 171 F.2d at pp. 623-4.

There was no proof that Florea intended the mails to be used; and the Court failed to instruct the jury properly on this essential element of the Government's case.

POINT III

Prejudicial error under this Court's teaching in *Grunewald* was committed when the Trial Court refused to correct its instruction on conspiracy by adding that the requisite overt act must be in furtherance of the conspiracy alleged.

On the second day of the jury's deliberations the jury requested the Court to repeat its instruction concerning the law of conspiracy (4857). In purporting to do so (4857 *et seq.*) the Court discussed the requirement that the Government prove beyond a reasonable doubt that at least one of the alleged overt acts occurred or was committed (4860).

In instructing the jury on the need for proof of an overt act in order to convict on the conspiracy count—the only count naming Florea—the Court neglected to state that such overt act must be in furtherance of the conspiracy alleged. Exception was taken by a co-defendant's counsel, in which Florea joined (4867-8). The Court refused to correct the instruction by adding the essential language (4868).

This error permitted the jury to convict on the basis of acts not in furtherance of the conspiracy alleged. However, as this Court said in *Grunewald* v. *United States*, 353 U.S. 391, 396-397, 415 (1957):

> "For where substantiation of a conspiracy charge requires proof of an overt act, it must be shown . . . that at least one overt act in furtherance of the conspiratorial agreement was performed within that period."

* * * * *

"Further, it was incumbent on the judge to charge that in order to convict the jury would have to find that the central aim of the conspiracy was to immunize the *taxpayers* from tax prosecution, that this objective continued in being through 1951, and that the overt acts of concealment proved at trial were at least partly calculated to further this aim."

POINT IV

Prejudicial error was committed when the Trial Court precluded cross-examination of Binstein on his motives to lie—avoiding indictment and jail and profiting from the effectiveness of a securities registration pending before the S.E.C.—and the state of his mind on the subject.

The case against Florea depended on the jury's acceptance of Binstein's testimony. Without Binstein the Government could not establish the existence of the alleged conspiracy.

Florea's objection with respect to the curtailment of Binstein's cross-examination was not restricted to Binstein's pending registration statement. Also raised by his appeal and ignored by the Court of Appeals is the preclusion of Florea from examining into Binstein's other motives to lie, namely, to avoid indictment in Donbar, to avoid jail, and his state of mind on these matters. Florea joined in the offer of proof made by counsel for another defendant on this subject (620-2). Moreover, contrary to the opinion below that counsel "didn't follow it up", on the Government's request the Court sustained an objection

to the following question and the entire line evidenced thereby: "Mr. Binstein, did you or anyone on your behalf, in words or substance ever say to any government representative that you would cooperate in Donbar, the Donbar investigation, if you were not indicted?" (941) (questioned by Florea's counsel). What more could Florea's counsel do?

In answer to the very first question by the Government, Binstein said: "I am connected with a group that is presently engaged in trying to purchase and switch a franchise in a professional basketball league to the East" (101-2). On cross-examination by counsel for Kaufman, Binstein repeated that answer (311) and testified that the only remuneration he received from this group was "expenses for traveling" (312). He identified the group as the Pipers Basketball Club, Inc. (312), the proposed registrant set forth in Florea's post-trial motion. Contrary to this testimony by Binstein, he in fact received far more than "expenses for traveling". As shown by the prospectus, Binstein received approximately 20.2% of the registrant's stock, which made him its largest single stockholder. Nevertheless, when the defense asked Binstein whether he had "engaged a brokerage firm by the name of Kenneth Bogue & Co. to sell that to the public", the Court sustained the Government's objection (599), thereby precluding *in limine* cross-examination of Binstein on this crucial issue. When it objected the Government well knew what it was keeping from the jury, and it led the Court into error.

At the very time of Binstein's direct testimony for the Government there was pending before the S.E.C. a regis-

tration statement of the Pipers Basketball Club,[1] of which Binstein was the largest stockholder. Binstein stood to gain great financial benefit from the proposed public offering. At least one preliminary prospectus was filed during the course of the trial. The registration statement became effective on June 30, 1969—eleven days after the jury verdict.[2] The foregoing facts are uncontroverted.

Accordingly, prejudicial error was committed when the Trial Court, sustaining the Government's objections (599-600), precluded cross-examination of Binstein concerning: the proposed public offering of stock in the Pipers Basketball Club and whether he had engaged the underwriter to sell the stock to the public (599); and whether Binstein had told his basketball partners that in return for testifying in Donbar he would not go to jail [he had pled guilty in the United States District Court for the Southern District of New York in the Pentron case before another judge (475)], and need not even consider it (Pentron) a conviction (600-1); and on the entire topic of whether he or anyone on his behalf, in words or substance, had ever told the Government he would cooperate in Donbar if he were not indicted (941). Binstein was not indicted in Donbar.

Contrary to the Trial Court's appraisal of the questions, the defense was not "asking whether or not, in effect, this Court has made a deal with this gentleman [Binstein]"; nor was the defense "putting words in the witness' mouth to the point where it was unnecessary and unfair" (602-3),

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[1] Now the Pittsburgh Pipers of the American Basketball Association.

[2] Florea's motion for judgment of acquittal under Rule 29(c) and, alternatively, for a new trial under Rule 33, dated July 29, 1969, supporting affidavit, Point III, pp. 10-12, and Exhibits A and B annexed to said affidavit.

or indeed at all. The defense did not claim, as the Court thought the questions implied, that the Court was part of a deal (604). The defense sought to ask, among other things, "whether this witness in his mind believes that he will not get a jail sentence" if he testifies (605).

It was error for the Court to restrict the defense to asking Binstein only whether he had "mentioned this case [Donbar] and the Pentron case" and whether he has "in words or substance told these gentlemen [his basketball partners] that in his opinion there is a good chance that he will get a suspended sentence" (606). These questions could in no way elicit Binstein's motive to testify—his state of mind that if he testified he would not go to jail and would be further benefited with respect to the proposed public offering of the Pipers Basketball Club (then in registration)—of which he was not merely "a stockholder", as he had testified in answer to the Court's questions (601), but the largest stockholder.

Binstein had a large financial interest in the pending registration. Although he testified that he was a stockholder and received only expense money for his efforts on behalf of the Pipers Basketball Club venture, his entire stock ownership of 36,333⅓ shares (which made him the largest single stockholder) arose from his agreement to receive all of this stock in consideration for his services. Prior to the effective date of the registration statement the stock had a tangible book value of $0.64 per share. On completion of the offering, which became effective on June 30, 1969 (eleven days after the verdict), the net tangible book value per share will be approximately $2.91 per share. The precluded cross-examination would have shown Binstein's financial interest in the S.E.C.'s declaring the reg-

istration effective and, hence, his financial interest in testifying. Even though his own shares were not being registered, effectiveness of the registration increased the anticipated value of his stock by $84,655.77.

Since the extent of Binstein's profit depended on the degree of public acceptance of the stock issue, it was important for Binstein to conceal his criminal past or, on making disclosure, to cast himself in a more favorable light. Thus, in the preliminary prospectus of June 10, 1969 there is no mention of Binstein's criminal past. However, disclosure of Pentron was made twenty days later. This disclosure does not refer to Donbar, in which he avoided indictment—an obvious benefit to Binstein, for there was one less stock fraud to disclose. Furthermore, after the Pentron disclosure, it states, in an obvious attempt to claim governmental approval of the "reformed" Binstein: "Mr. Binstein has cooperated with the Government."

Binstein had improper motives to testify favorably to the Government, and the defense should not have been precluded from inquiring. Not only did he avoid indictment in Donbar, but at the very time of his trial testimony he stood to profit from the effectiveness of a registration statement before the S.E.C.

A witness' financial motive for testifying is a most important subject for cross-examination. *Wheeler* v. *United States,* 351 F.2d 946, 947 (1st Cir. 1965); *Harris* v. *United States,* 371 F.2d 365, 367 (9th Cir. 1967). Indeed, motive to falsify may be shown not only by cross-examination but also by extrinsic evidence. *United States* v. *Lester,* 248 F.2d 329, 334 (2d Cir. 1957). Yet no inquiry at all was permitted with respect to Binstein's activities in connection with the public offering at the time he was helping

the Government. Complete preclusion of cross-examination as to this motive for testifying was an abuse of discretion. *United States* v. *Mahler*, 363 F.2d 673, 677 (2d Cir. 1966). To cut off *in limine* all inquiry on a subject with respect to which the defense is entitled to reasonable cross-examination is an abuse of discretion and prejudicial error. See, e.g., *Alford* v. *United States*, 282 U.S. 687, 694 (1931).

As the Court noted in *McConnell* v. *United States*, 393 F.2d 404, 406 (5th Cir. 1968):

> "Cross-examination is a right and its availability is essential to fair trial; accordingly, cross-examination of a witness in matters pertinent to his credibility ought to be given the largest possible scope. *Harris* v. *United States*, 9 Cir., 1967, 371 F.2d 365, 366, 367 . . . Where the Government's case may stand or fall on the jury's belief or disbelief of one witness, his credibility is subject to close scrutiny. *Gordon* v. *United States*, 344 U.S. 414, 417, 73 S. Ct. 369, 372, 97 L. Ed. 447 (1953)."

POINT V

It was error to preclude cross-examination by Florea as to Seigenfeld's credibility after Seigenfeld testified that Florea was responsible for Seigenfeld's Donbar trading at Richter.

At a conference in chambers, counsel for defendant Seigenfeld requested and obtained from the Court a ruling that neither the Government nor defendant Florea would be permitted to cross-examine co-defendant Seigenfeld or his witness James Richter (his brother-in-law, employer and the principal of Richter & Company (3811-12) where Florea was employed (3850)) with respect to the suspensions and fines of Seigenfeld and Richter by the American Stock Exchange and the underlying facts giving rise to those suspensions and fines.[3] This error, prejudicial to Florea, was compounded by the summation on behalf of Seigenfeld, which no one could foresee at the time of the Court's ruling.

Seigenfeld invited the jury (in his own testimony, through his witness James Richter, and primarily in his counsel's summation) to speculate that Florea was responsible for his conduct, e.g.: that Seigenfeld heard of Donbar from Florea (4097); that he *may* have heard from Florea that M. L. Lee & Company (the selling broker for Kroll) (116) had Donbar to sell (4102);[4] that in Seigenfeld's ab-

[3] Florea's motion for judgment of acquittal under Rule 29(c) and for a new trial under Rule 33, July 29, 1969, supporting affidavit, Point X, page 22 and Ex. C; 4971-2.

[4] The Court erroneously denied Florea's motion to strike and over objection permitted repeated testimony about this "possibility" (4152-3, 4195-9).

sence "a friend"[5] may have handled his accounts that traded Donbar (3833-6); that Florea may have delivered, and thus been responsible for the entries on, the Schneiderman new account card—Gov. Ex. 6—although the substance of the Schneiderman-Binstein testimony was that it had been mailed (469-70, 1301); and other examples too numerous to mention. See the summation on behalf of Seigenfeld, pp. 39, 44, 67-72, 90).

In view of the summation on behalf of Seigenfeld the Court should have instructed the jury in accordance with Florea's Request No. 7, which reads:

> "No conviction can be based upon suspicion, conjecture or mere probabilities as to any one of the elements necessary to prove the charge asserted."

Although the Court had said it would charge in accordance with Florea's Request No. 7, that instruction was not given. In the face of Seigenfeld's summation, the instruction was critical, and prompt exception was taken to the failure to charge (4814-15).

It is well settled that a defendant who testifies may be cross-examined concerning any immoral, vicious, or criminal acts which may have a bearing on his credibility as a witness. The offenses inquired into on cross-examination to impeach credibility need not be similar to the crime charged, and the questions need only have some basis in fact and be asked in good faith. *People* v. *Schwartzman*, 24 N.Y.2d 241, 244 (1969); *People* v. *Kass*, 25 N.Y.2d 123, 125-6 (1969).

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[5] Seigenfeld testified that he knew Florea all his life and that in 1968 they were very good friends and worked in the same office (at Richter & Company) (4095-6).

The American Stock Exchange proceeding was held pursuant to the statutory scheme of self-regulation mandated by the Securities Exchange Act of 1934, under rules of the American Stock Exchange submitted to and approved by the Securities and Exchange Commission. Impeachment of Seigenfeld and Richter by the findings of and the sanctions imposed by the Exchange was proper, for they constituted an adjudication pursuant to the regulatory scheme for national exchanges enacted by Congress.

The order of preclusion obtained by Seigenfeld's counsel was understood as such by Florea's counsel and obviously by the Government as well. The Government's cross-examination of defendants and defense witnesses who testified was far ranging. However, the Government, in cross-examining Seigenfeld and Richter, did not touch upon the adverse adjudication against them by the American Stock Exchange for their violations of the Securities Exchange Act of 1934 and for Seigenfeld's perjury.

Seigenfeld's violations involved not only the floor trading rules of the American Stock Exchange, but those of the Securities and Exchange Commission as well. His violations were of S.E.C. rules and regulations promulgated under the Securities Exchange Act of 1934, a federal crime. Moreover, Seigenfeld made a material misstatement to the American Stock Exchange under oath on the subject matter of its investigation. In other words, he committed perjury.

As for James Richter, he not only violated a rule of the American Stock Exchange, he also violated Regulation T, a federal crime. Moreover, Richter was found responsible for a violation of Regulation T with respect to the extend-

ing of credit to Seigenfeld without collateral for the purpose of trading in securities, and for his firm's failure to exercise effective supervision over accounts of officers of the corporation (i.e., Seigenfeld).

Richter was found guilty on four charges and was suspended for six months and fined $10,000.00. Seigenfeld was found guilty on three charges and suspended for three months and fined $7,500.00. See the American Stock Exchange release detailing all of the foregoing matters concerning the charges against Seigenfeld and Richter and their disposition (Florea App. pp. 10a-13a).

Although the acts of Seigenfeld and Richter were immoral and criminal, Florea was cut off *in limine* from inquiring with respect thereto. This was prejudicial error. See, *Alford* v. *United States*, 282 U.S. 687, 694 (1931). The previously quoted (Point IV, *supra*) language of the Court in *McConnell* v. *United States*, 393 F.2d 404, 406 (5th Cir. 1968) is equally in point here.

Cross-examination of Seigenfeld, in particular in this matter which was pertinent to his credibility, should have been given the largest possible scope. This was especially so since the jury was asked to choose between the credibility of Seigenfeld and the credibility of Florea (Seigenfeld Summation, p. 70). In contrast to the extensive cross-examination of Florea, cross-examination of Seigenfeld was effectively precluded, although Seigenfeld's credibility should have been subjected to close scrutiny. *Gordon* v. *United States*, 344 U.S. 414, 417 (1953).

The result was that the jury acquitted Seigenfeld, an officer and partner of Richter & Company (4084-5), but convicted Florea, the lowly registered representative. It

accepted Seigenfeld's testimony and his attorney's summation which invited the jury to speculate and placed the blame on Florea.

At the time of sentence the Court observed:

> "There is another thing here which again I suppose is not technically and typically a part of this process, but we all know that Mr. Alan Seigenfeld was acquitted by the jury, and I accept that. I think that was their prerogative, but, on the other hand, let us be a little realistic here. If you analyze the paper proof—forget what everybody said, just look at the papers, the contemporaneous papers—it would be a little hard for me, if I were the trier of the facts, to say to either Florea or Seigenfeld, it does not matter which one, you are totally innocent and you are totally guilty; and though that is not the primary reason that I have chosen to suspend execution of the sentence, I am going to propose it is a practical cloud, a little cloud left, shall I say, which casts its shadow, at least it would on me if I were in Florea's position. This is not a legal matter in my judgment, but it is a practical matter and I perforce thought about it" (4983-4).

POINT VI

The Braun exhibits (Gov. Exs. 401-406) were inadmissible hearsay not within the declaration of co-conspirators exception to the hearsay rule, and, moreover, were merely narrative declarations of past facts and thus inadmissible.

It was error to admit the Braun documents (Gov. Exs. 401-406) in evidence. They were hearsay and, more specifically, they were merely narrative declarations of past facts by Binstein or Kroll and thus inadmissible under a long line of cases.[6]

Braun testified that they were prepared for the purpose of an accounting between Binstein and Kroll designed to further the preparation of Kroll's fraudulent income tax returns. Braun had no knowledge whatsoever of the underlying transactions, and his documents reflected merely what he had been told. Accordingly, the Braun exhibits were not admissible as being in furtherance of the conspiracy nor within the declaration of co-conspirators exception to the hearsay rule. See *Krulewitch* v. *United States*, 336 U.S. 440, 443-444 (1949); *Fiswick* v. *United States*, 329 U.S. 211, 217 (1946); *Logan* v. *United States*, 144 U.S. 263, 309 (1892); 72 Harv. L. Rev. 920, 985-86 (1959).

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[6] *United States* v. *Goodman*, 129 F.2d 1009, 1013 (2d Cir. 1942) and *Van Riper* v. *United States*, 13 F.2d 961, 967 (2d Cir.), *cert. denied sub nom.*, *Ackerson* v. *United States*, 273 U.S. 702 (1926). See also, *United States* v. *Birnbaum*, 337 F.2d 490, 494-5 (2d Cir. 1964); *United States* v. *Borelli*, 336 F.2d 376, n. 4 (2d Cir. 1964); *United States* v. *Annunziaro*, 293 F.2d 373 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961); *United States* v. *Compagna*, 146 F.2d 524, 530 (2d Cir. 1944), *cert. denied*, 324 U.S. 867 (1945).

The fact that a co-conspirator tells another something relevant to the conspiracy does not alone make the declaration competent; the declaration must itself be an act in furtherance of the common object; mere conversation between conspirators is not that. *United States* v. *Nardone*, 106 F.2d 41, 43 (2d Cir.), rev'd on other grounds, 308 U.S. 338 (1939). Therefore the Braun exhibits should not have been received. The inadmissibility of such declarations comports with the agency rationale that has traditionally supported the co-conspirators hearsay exception. Such declarations of a co-conspirator are competent against an absent defendant only because they are a part of the execution of the plan and have been impliedly authorized by the others. See *Lutwak* v. *United States*, 344 U.S. 604, 617 (1952). Braun's written recitals of what he was told by Binstein or Kroll, however, fall well outside the scope of such implied authority of Binstein and Kroll as alleged conspiratorial agents of Florea and can hardly be said to bear Florea's implied authorization.

Braun was called by Florea. His direct testimony took a matter of minutes. It was restricted to Binstein's claim that Government Exhibit 1 (GX 1) was Braun's idea and that Braun regularly supervised its execution, all of which Braun denied.

His cross-examination by the Government took hours. It did not concern Braun's repudiation of Binstein's testimony about GX 1. Rather, it covered an entirely new line, unrelated to his direct examination, as to which Braun was obviously made the Government's own witness. Through Braun, the Government over continued and strenuous objection (3723-7, 3729) introduced prejudicial and in-

admissible hearsay, which it stressed in summation against Florea.

Although the Government was fully aware of Binstein's allegations against Braun, and although it had Braun's schedules and diary, Braun was not named as a co-conspirator in the indictment, in the bill of particulars, or in the supplemental bill of particulars served by the Government on the eve of trial (3511-12). Accordingly, under the indictment as confirmed by the Government through its particulars, there was no agency relationship alleged between the defendants and Braun. The defendants should not have been required to meet this belated charge made after the Government rested its direct case. Indeed, when this objection was made by Florea at trial the Government argued Braun was a co-conspirator for *tax evasion* purposes but not with respect to the charges in the indictment (3511-12). What does Kroll's *tax evasion* have to do with the defendants in this case? While he was the agent of Binstein and Kroll—his services being required by their financial machinations unrelated to the alleged conspiracy—Braun was not the agent of the defendants. As to them, no accounting was required or contemplated.

GX 401-406 were based primarily on what Braun had been told after the alleged fact by Kroll or Binstein. While portions correspond to GX 1, in substantial part they conflict with it. Contrary to the Government's belated explanation for their admissibility, GX 401-406 in no way rebutted Braun's denial that he planned GX 1, nor do they establish that Braun may have had conversations with Binstein concerning Donbar prior to the June 11, 1963 meeting. The Government's conclusion that from these schedules

the jury was able to infer that Braun had instructed Binstein on the format of GX 1 but that Braun had forgotten this, is a *non sequitur*.

The documents were not the professionally prepared schedules customary in the course of an accounting. Braun was a mere scrivener who had none of the back-up documentation for any of the alleged Binstein payments required by an accountant for a "professionally-prepared accounting" (3520-1). Accordingly, the reliance below on the Business Record Act, 28 U.S.C. 1732(a), is misplaced, for it is not the usual course of business for an accounting to be prepared without underlying documentation. Nor, as Braun testified, was it in the usual course of an accountant's practice to prepare schedules such as these with entries that do not run chronologically but skip backward and forward (3731-2, 3738-40).

The Braun exhibits were inadmissible and alone may well have tilted the scales against Florea. The Government forcefully argued so. Discussing Exhibits 401-406 in summation, the Government told the jury that "these exhibits, together with Braun's explanation, reinforced what Mr. Binstein said" (5076-7). Referring particularly to Exhibit 406 Government counsel said "it is a document which is very damaging to their [the defendants'] case. Florea's attorney and Burns' attorney are those attorneys who are most upset by this. That is because their clients happened to have their names on it" (5077). Continuing, Government counsel told the jury:

> "There is a notation in which Florea is listed together with the name Carlan, and it is indicated that in settlement of a finder's fee a payment of $800 was made to these individuals" (5078).

After noting the contention in summation of Florea's counsel that the spelling on Exhibit 406 is "Floria" and that the name "Carlan" nowhere appeared in any of the testimony (of Binstein or anyone else) or in any of the voluminous documentation reflecting Donbar transactions (save for Exhibit 406), Government counsel said that Florea's name "is here [on Exhibit 406] because it [Exhibit 406] reflects the presence in this conspiracy, the real presence of Mr. Florea" (5078). Continuing, Government counsel said:

> "There can't be too much of a question as to what this entry refers to. It is evidently the recording of one of the fees received by Florea in connection with Donbar, and Carlan is evidently a person involved in the finding of a particular broker, a broker perhaps that we have not heard much about here. Maybe it is just speculation, but it may be Broadwall. We don't know" (5078-9).

The "Carlan-Floria" entry did not appear on GX 1 (3721, 3745). It is the only completely undated entry on

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[7] A further vice inherent in Exhibit 406. The Court's attention is directed to the fact that the entry in question reads "Carlan-Floria settlement finder's fee 800." Unlike all the other entries on Exhibit 406, this entry alone bears no date. Moreover, there is no corresponding entry on Gov. Ex. 1 which purports to list all the payments made by Binstein in connection with the alleged conspiracy. It should also be noted that Exhibit 406 lists a payment of $1250 to Eastman Dillon. During his testimony Binstein had steadfastly denied making any improper payments to Eastman Dillon. Binstein also denied making any improper payments to Flomenhaft. However, Exhibit 406 lists a payment to Flomenhaft of $225. Exhibit 406 also lists a payment of $200 to E. F. Hutton. There was no testimony of any such payment by Binstein or anyone else. Also note that whereas Ex. 405 covers the month of May in chronological order, the dates of Ex. 406 are not chronological, but jump around, and include numerous transactions alleged to have occurred in May although such transactions were presumably covered by Ex. 405 (see also 3731-2, 3738-9).

GX 406, and Braun had no idea of the date to which that entry applied (3745-6). Not even the month of the alleged payment is noted. Binstein was never asked by the Government about it. Braun knew absolutely nothing about it. Braun "assume[d] someone told it to him." He "*suppose*[*d*] Mr. Binstein or Mr. Kroll," and added, "but I really don't recall the entry at all." He had no recollection that either Binstein or Kroll gave him the information. The entry was in his handwriting. Other than that, he said, "I have no recollection at all" (3717-19, 3722, 3744-5). The Government's claim below that GX 401-406 constituted a "past recollection recorded" is at war with Braun's testimony that he never knew anything about the alleged payments but merely wrote what he had been told (3516-18). This applied to all the Braun exhibits which purported to reflect the payment of money by Binstein, including GX 406 (3518). A "past recollection recorded" requires its author to have had personal knowledge of the matters which he accurately recorded at the time but no longer remembers. That is not so with respect to GX 401-406.

Moreover, many entries on these exhibits conflict with Binstein's testimony. Thus, GX 405 and 406 reflect large payments to Flomenhaft and Carno (3530-2, 3741-2), which Binstein on cross-examination admitted had been pocketed by his associates, Gold and Halperin, and by himself (*supra*) and to Eastman Dillon and E. F. Hutton, as to which Binstein had said nothing (3742-4).

POINT VII

Government Exhibit 1 was neither kept in furtherance of the conspiracy nor as a business record within 28 U.S.C. §1732(a). The entries were so lacking in reliability as to bar admissibility under the business records statute.

Binstein testified that the preparation of Government Exhibit 1 was directed by Braun to whom he periodically showed Exhibit 1 as he made entries thereon (120-1). Called by the defense, Braun testified that this was not true. According to Braun, he did not direct its preparation (3394-5), and he did not see Exhibit 1 until the second week of June 1963 (3397).

By referring to his diary, which was in the Government's possession, Braun was able to fix the time he first saw Exhibit 1 as January 11, 1963 at 10:00 a.m. (3397-8, 3400; Florea Ex. G). The diary had been turned over to the Government a few months before Braun testified (3397). Braun had been interviewed by the Government in connection with the case on approximately six occasions, but was never called to testify before the grand jury (3401). He was last interviewed by the Government one week before the defense called him as a witness (3401), and at that time the Government interrogated him about Exhibit 1 (3402). Nevertheless, the Government did not call Braun as a witness, nor did it inform the defense of Braun's statement with respect to Exhibit 1, nor did it make available to the defense Braun's diary, the existence of which was only discovered by the defense in mid-trial, long after Binstein's testimony, without any assistance or information from the

Government. The defense did not see Braun's diary until it was produced in Court by the Government (3398-9).

Florea was particularly prejudiced because Exhibit 1 purports to reflect transactions with and payments to Deitz, Broad & Wall, Richter, Harris Clare and Frame, which Binstein and the Government said were the responsibility of Florea.

GX 1 was a mass of errors, corrections and entries which Binstein could not explain, showing that it was not a contemporaneous record. Binstein was unable to explain the many cross-outs (653, 730). Nor could Binstein explain the checkmarks he had made (721) or various other entries and cross-outs although they had been made by him (722). Binstein conceded that entries on GX 1 reflecting payments to the brokerage firms of Flomenhaft and Carno were incorrect and that the money had in fact gone to him, to Gold and to Halperin (730-1). With respect to Frame & Co., Binstein conceded that the dollar amounts reflected thereon did not coincide with the number of shares (731-4). On GX 1, Binstein also made entries for trades on a Saturday, which he thereafter corrected (745-6), and entries for June were originally listed as entries for May (747-750, 911).

Moreover, a significant portion of GX 1 could not fall within the business records rule, 28 U.S.C. 1732(a), because, by Binstein's own testimony, it was not in the regular course of his business to make the entries below the wavy line (736-8). Furthermore, Binstein had no idea of the source of numerous entries (740, 742). Binstein claimed to have obtained his information for GX 1 from many unidentified people (742).

GX 1 was therefore inadmissible. *United States* v. *Graham*, 391 F.2d 439, 447-8 (6th Cir. 1968); *Standard Oil*

Co. v. *Moore*, 251 F.2d 188, 214-15 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958).

Government Exhibit 1 is not a sheet out of a ledger or journal or some other record of a bookkeeper or accountant. It is a maverick, an unorthodox kind of figure-keeping that progressively deteriorated. Especially when dealing with the unusual under the statute, this Court has noted that the guarantee of reliability must come from the nature of source of the entries. This Court has said that under such circumstances "random" sources just do not satisfy the regularity requirements that make for reliability; "multiple hearsay" from stray sources is simply not permitted. Judge Learned Hand spelled out the rule which governs such stuff as Exhibit 1 in *United States* v. *Grayson*, 166 F.2d 863, 869 (2d Cir. 1948):

> "The statute did not mean to make competent whatever the entrant picked up from random sources, although it was part of his business to pick up information where and when he could and make a record of it. The 'act, transaction, occurrence or event' which the entrant records must be one of which either he has knowledge, or which he learns from a declarant who shall 'in the course of the business transmit the information for inclusion in the memorandum.' 'Multiple hearsay' is no more competent now than single hearsay was before." (footnotes omitted).

CONCLUSION

For the reasons stated, the writ of certiorari should be granted.

Dated: New York, New York
August 21, 1970

Respectfully submitted,

JEROME J. LONDIN
Counsel for Petitioner

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 564-7—September Term, 1969.

(Argued March 18, 1970 Decided July 22, 1970.)

Docket Nos. 33979, 33980, 34004, 34348

UNITED STATES OF AMERICA,

Appellee,

—v.—

PAUL M. KAUFMAN, STEVEN BURNS, ALAN FLOREA, and IRVING GARBER,

Appellants.

Before:

MOORE and FEINBERG, *Circuit Judges;*
BONSAL,* *District Judge.*

Appeal by defendants from judgments of conviction of conspiracy under 18 U.S.C. §371 to violate the anti-fraud provisions of the Securities Act of 1933 (15 U.S.C. §§77 q(a) and 77x) and of substantive violations of said sections entered after a jury trial in the United States District Court for the Southern District of New York, Harold R. Tyler, *J.*

Affirmed.

* Of the Southern District of New York, sitting by designation.

DANIEL J. SULLIVAN, Asst. United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York; William B. Gray, Arthur A. Munisteri, Asst. United States Attorneys, on the brief), *for Appellee.*

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BURTON S. COOPER, New York, N. Y. (Shatzkin and Cooper, New York, N. Y.; Edwin L. Smith, on the brief), *for Appellant Garber.*

BONSAL, *District Judge*:

Paul M. Kaufman, Steven Burns, Alan Florea and Irving Garber appeal from judgments of conviction entered against them on July 29, 1969 after a seven-week trial before Judge Tyler and a jury. The indictment (68 Cr. 485) was filed on June 3, 1968 and charged ten defendants in seventeen counts. Five defendants, including the four appellants, went to trial, and twelve counts went to the jury. Count 1, the conspiracy count, charged a conspiracy under 18 U.S.C. §371 to violate the anti-fraud provisions of the Securities Act of 1933 (15 U.S.C. §§77q(a) and 77x).

The eleven substantive counts charged violations of these sections in sending confirmations of stock transactions through the mails. The substantive counts are also described as overt acts in the conspiracy count as acts done pursuant to the alleged conspiracy. Defendant Seigenfeld was acquitted by the jury with respect to the conspiracy count, the only one in which he was charged.

The jury convicted all four appellants under the conspiracy count; Kaufman and Burns on counts 3, 5, 8 and 9, in which they alone were charged; and Kaufman on counts 10, 11, 12, 13, 15, 16 and 17, in which he alone was charged.[1] For the reasons hereinafter stated, we affirm the convictions of each of the appellants.

Statement of Facts

Daniel Kroll, who died in August 1963, was the former president of Donbar Development Corporation (Donbar), which was engaged in the development, building and sale of interracial residential real estate on Long Island and in New Jersey. In January 1963, Kroll lost a proxy fight and was removed from the presidency of Donbar. He owned 82,000 unregistered shares of Donbar, a thinly traded stock selling in the over-the-counter market. A part of his holdings was tied up in a voting trust agreement.

In March 1963, with the assistance of appellant Kaufman's law firm, Kroll obtained a no-action letter from the

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1 Defendants were sentenced on July 29, 1969. Kaufman received concurrent nine-month sentences and a $2,000 fine on each count, but execution of the prison term was suspended on all except the first count. Burns received concurrent four-month sentences and a fine of $1,000 on each of the Counts 1, 3, 5, 8 and 9, but execution of the prison term was suspended on all but the first count. Florea received a sentence of four months imprisonment on Count 1, the execution of which was suspended, and a fine of $1,500. Garber received a sentence of three months imprisonment and a fine of $1,000 on Count 1.

S.E.C., and later in the month began selling some of his available Donbar stock. He encountered difficulties and, in early April, asked for assistance from Mark Binstein, the chief Government witness, who, at the time, maintained an office under the name of National Market Relations, Inc. and employed a Mrs. Eveline Gold on a part-time basis.

Kroll, Binstein and appellant Garber, the owner and operator of an unincorporated over-the-counter securities firm, called Nassau Securities Service, worked out a scheme to sell some 40,000 shares of Kroll's Donbar stock to the public. The scheme involved the paying of cash bribes to salesmen, selective buying to raise and support the market price of the stock, controlled selling so as not to depress the market, and the "squeezing" of short sellers. Appellant Garber was to cause enough Donbar shares to be bought to raise its price from 3-3½, to 4¼-4¾. Appellant Kaufman joined the scheme and brought in S. C. Burns & Co., Inc. and its president, the appellant Steven Burns, to participate in the distribution of the Kroll stock. Cash payments were made to Burns in return for retail sales by his firm, and the payments were escrowed with Kaufman until the Burns sales had been completed. Kaufman introduced the principals of Harris, Clare & Co., clients of his law firm, to Kroll, and told them they would receive $1.00 cash per share for Kroll stock they sold to customers. Appellant Florea agreed to find brokers to take Donbar stock, and was to receive from Binstein 25¢ in cash for each share so taken. One of these brokers was Seigenfeld, who was acquitted of conspiracy by the jury. Florea was paid in cash by Binstein for his services.

The scheme was carried out during May and June, 1963. The selling of Kroll's available Donbar stock was substantially completed in June, 1963. His shares were sold at

prices ranging from $3.00 to $4.00 per share, and thereafter the price dropped to $1.50 to $2.00 per share. None of the retail purchasers who bought Donbar stock were told of the cash payoffs which were made to salesmen to stimulate their recommendations or that the price of the stock was being rigged while they were buying.

Sufficiency of the Evidence

The jury having found each of the appellants guilty, the evidence must be viewed most favorably to the Government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Bowles*, —— F.2d ——, Docket Nos. 34335-6, 34497 (2d Cir., June 16, 1970), Slip Op. 3311, 3312; *United States* v. *Tropiano*, 418 F.2d 1069, 1075 (2d Cir. 1969), *cert. denied*, —— U.S. —— (38 U.S.L.W. 3388, April 6, 1970); *United States* v. *Kahaner*, 317 F.2d 459, 467 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963). So viewed, the evidence established an unlawful conspiracy to sell Kroll's Donbar stock through the use of fraudulent and manipulative devices, and the participation of each of the appellants in the conspiracy.

The Government was not required, as appellants contend, to prove that each appellant was involved in all phases of the conspiracy. It was sufficient for the Government to prove that each of them knowingly joined the conspiracy to sell the stock by the use of fraudulent and manipulative devices. *United States* v. *Dardi*, 330 F.2d 316, 327 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964) and cases cited therein. The evidence establishes that Garber aided Binstein and Kroll in setting up the scheme and undertook to supervise the distribution of the Donbar stock. Mrs. Gold and Binstein went to Garber's office to obtain information concerning the market operations. Kaufman, as Binstein and

Kroll's attorney, actively participated in the conspiracy and acted as escrow agent for the cash payments to be made to appellant Burns and received cash from Binstein for that purpose. Burns does not deny that he was to receive payments from Kaufman, but he contends that he did not know of the market rigging aspect—"one prong of the prosecution's two-pronged scheme and conspiracy theory." As stated above, it is immaterial that he may not have known of all of the facets of the conspiracy.

Appellant Florea strenuously contends that he was not a member of the conspiracy, and we consider the evidence as to his participation in more detail.

Florea asserts that there is no evidence of his agreement to effect fraudulent sales of Donbar stock to the public, and that his participation was limited to the "buy" function. Binstein testified that following his first meeting with Kroll, he met with Florea and told him in detail what was contemplated—"that Mr. Kroll would pay $100 per 100 shares for anybody who wanted to participate in the corner, and in the run-up of the stock of Donbar Development Corporation." Binstein testified that,

> "The brokers were told to buy the stock, to put in for clients or trading accounts or anything, but to be put away, not to be sold immediately thereafter, immediately after buying it."

and that this was in substance what he told Florea.

Binstein testified that Florea visited his office on a number of occasions in May-June, 1963 in connection with the sale of Donbar stock. He testified that Florea "was coming to both collect money for himself and the people he had brought into the Donbar situation, and on a couple of occasions just to come to check [Binstein's daily progress re-

port] . . . to see what buying was done by whom, to make sure he received what he thought he was entitled to." Binstein also testified that Florea had introduced him to Seigenfeld and Dietz Securities. Binstein testified that Florea demanded compensation for his services with respect to Harris Clare and Dietz Securities and that he made a number of cash payments to Florea in connection with Dietz and Harris Clare. Mrs. Gold testified concerning discussions between Florea and Binstein in Binstein's office that,

> "He [Florea] was discussing the amount of money that Binstein owed him for putting certain buying into Donbar although I never actually saw him get paid,"

and that

> "Mr. Florea was claiming compensation for Dietz buying."

Florea testified that he had never heard of Kroll and that he first heard of the Donbar company in 1967, in the U. S. Attorney's office. Florea conceded only that he knew Binstein, as they had been at West Point together. He testified that he never introduced any brokers to Binstein for the purposes of buying or selling Donbar, and he denied receiving any payments from Binstein in connection with Donbar stock. On cross-examination, Florea testified that he occasionally went to Binstein's office, where he saw Binstein and Mrs. Gold. Florea conceded that he could have heard about Donbar in 1963, that he may have told the U. S. Attorney in 1968 that Donbar was represented by Binstein in a public relations capacity, and that he may have heard Kroll's name mentioned in Binstein's office. He also testified that he knew Kaufman and may have seen Burns socially.

The evidence with respect to Florea presented a question of credibility for the finder of fact—whether to believe Binstein or to believe Florea. The jury deliberated two days and considered the evidence with great care, which is demonstrated by the fact that they acquitted Seigenfeld. The evidence establishing that Florea knowingly participated in the conspiracy, knowing both about the fraudulent sale of the Kroll stock to the public as well as the market support operation, was sufficient if the jury believed it—and they did.

Therefore, the evidence establishes that each of the appellants was a member of the conspiracy charged in the first count. Florea contends that the proof fails to show that he knew that the mails would be used in carrying out the conspiracy. However, the proof was sufficient to enable the jury to find that Florea knew that the mails would be used in connection with the distribution of Kroll's Donbar stock. Indeed, as a "registered representative," Florea must have known that the mailing of confirmations was routine in the sale of securities on the over-the-counter market.

Moreover, the proof showed that the confirmations which were the subjects of the overt acts in the conspiracy count and of the substantive counts, were in fact mailed, and that they were mailed in furtherance of the conspiracy. Therefore, the jury having found Kaufman and Burns guilty under the conspiracy count, could find them guilty under the substantive counts as well. The jury was not required to find that Kaufman or Burns knew or should have foreseen that the mails would be used in sending the confirmations listed in the substantive counts. The mails are included in the statute as a ground for Federal jurisdiction. The recent decision of *United States* v. *Blassingame*, —— F.2d ——, Docket No. 33988 (2d Cir., June 1,

1970) overruling *United States* v. *Houlihan*, 332 F.2d 8 (2d Cir.), *cert. denied*, 379 U.S. 828 (1964) holds that the essence of the crime is the fraudulent scheme itself and that there is no reason why guilt under the statute should hinge upon knowledge that interstate communication or the mails were used. Since Kaufman and Burns were members of the conspiracy and the mailings were overt acts in furtherance of the conspiracy, they were properly found guilty of the substantive counts by reason of the fraudulent scheme in which they knowingly participated.

We find, therefore, that the evidence was sufficient to support the jury's conviction of the appellants on all counts.

Government Exhibit 1

Government Exhibit 1, which was received in evidence over objection, was Binstein's daily progress record of the sales of Kroll's Donbar stock and the cash payoffs. The record started on May 16 and continued to June 6, 1963. It contains a number of corrections, side notes, and computations. Appellants Burns, Florea, and Garber urge that Government Exhibit 1 was not a business record and should not have been received in evidence. However, Exhibit 1 was a contemporaneous record kept in the ordinary course of business and was properly received. *United States* v. *Re*, 336 F.2d 306 (2d Cir.), *cert. denied*, 379 U.S. 894 (1964). It was a record kept in furtherance of the conspiracy. The items were documented by other brokerage records and corroborated by testimony at the trial. It was clearly a business record kept for a business purpose. Therefore, Government Exhibit 1 was properly admitted, and it was for the jury to determine the weight to be given it.

Government Exhibits 401-406—The Braun Schedules

A more difficult issue is presented by the Braun schedules. Braun was Kroll's accountant. He testified that he prepared these schedules on or immediately after June 11, 1963, following a meeting which he had with Kroll and Binstein, and that the schedules set forth information contained in Government Exhibit 1, which they furnished him, supplemented by information given to him by Kroll and Binstein at the June 11 meeting. There was evidence to indicate that the purpose of these schedules was to serve as an accounting between Kroll and Binstein, and perhaps to be used in a tax fraud in which they alone were engaged. The Braun schedules were not offered by the Government during the Government's direct case. Braun was called as a witness by appellant Florea, apparently in an attempt to contradict Binstein's testimony that Braun had laid out the format of Government Exhibit 1. In cross-examining Braun, the Government offered the Braun schedules to corroborate Binstein's testimony. The Government made effective use of the Braun schedules at the trial and in the course of its summation.

Appellants raised timely objections to the introduction of the Braun schedules—which objections were overruled. On this appeal, they contend that the Braun schedules should have been excluded under the hearsay rule and that the trial judge's failure to do so seriously prejudiced their rights to a fair trial. Appellants assert that the conspiracy had terminated before June 11 and that, therefore, the Braun schedules were not and could not have been prepared in furtherance of the conspiracy, and were therefore mere prejudicial hearsay as to them.

However, the evidence indicates that the conspiracy had not come to an end when the Braun schedules were pre-

pared. The settlement dates on various sales of the stock did not occur until after June 11, and other activities in connection with the distribution of the stock were not finally concluded until June 24, 1963. We note that much of the information contained in the Braun schedules had been previously set forth in Government Exhibit 1. Moreover, even if the Braun schedules were in the nature of an accounting between the primary conspirators, Binstein and Kroll, they also revealed the status of the conspiracy with respect to the appellants. As such, they were properly received as a business record made before the final termination of the conspiracy, setting forth the interests of those involved. *United States* v. *Cohen*, 384 F.2d 699, 701 (2d Cir. 1967); *United States* v. *Hickey*, 360 F.2d 127, 143-44 (7th Cir.), *cert. denied*, 385 U.S. 928 (1966); *United States* v. *Re*, *supra*. The appellants were given adequate opportunity to cross-examine Braun with respect to the schedules and to argue in their summations the weight to be given them by the jury.

Other Contentions

The remaining contentions of the appellants do not require extended discussion.

Appellants Florea, Kaufman and Garber contend that their cross-examinations of the Government witnesses were unduly restricted by the trial judge, but we find these contentions to be without merit. The trial judge in a lengthy trial must be afforded reasonable discretion to limit cross-examination, and we do not find that the trial judge abused this discretion, *United States* v. *Crosby*, 294 F.2d 928, 944 (2d Cir. 1961), *cert. denied*, 368 U.S. 984 (1962). Appellants complain that they were not allowed to cross-examine Binstein regarding his relationship with a professional

basketball team or whether he had informed his associates in that venture that in return for testifying "he was not going to get a jail sentence." The record reveals that this issue came up out of the hearing of the jury when Seigenfeld's attorney engaged in a lengthy colloquy with the trial judge. At the end of it, the trial judge allowed Seigenfeld's attorney to ask the questions in another form, but he didn't follow it up and neither did the attorneys for the appellants. Nor was it error for the trial judge to preclude inquiry as to Binstein's address. *United States* v. *Persico*, —— F.2d ——, Docket Nos. 34016, 34119, 34235, 34344 (2d Cir., April 15, 1970). In view of the prior relationship between Binstein and appellants, it is hard to see why this was prejudicial, nor did any of the appellants advance sufficient reason to show that it was prejudicial.

Kaufman and Florea contend that the trial judge erred in allowing testimony by Mrs. Gold concerning a prior illegal stock distribution in which Florea and Binstein, and perhaps Kaufman, were involved. However, except for statements made by Mrs. Gold outside of the hearing of the jury, her testimony does not contain any references to prior illegal acts in which the appellants were involved.

Appellant Garber, who appeared *pro se* throughout the trial, contends that he was improperly restrained by the trial judge and that these restraints violated his constitutional right not to testify. Garber's argument is totally without merit. The record shows that from time to time he made statements directly to the court and jury and was properly restrained by the trial judge. Indeed, to the extent that some of his statements might be construed as testimony he may have waived his right to refuse to testify. *See, United States* v. *Lacob*, 416 F.2d 756, 760 (7th Cir. 1969), *cert. denied*, —— U.S. ——, 38 L.W. 3287

(1970); *Redfield v. United States*, 315 F.2d 76, 80 (9th Cir.), *cert. denied*, 369 U.S. 803 (1963). During the course of Garber's rambling cross-examination of Binstein, the trial judge remarked, "Don't ask him that kind of thing. Ask him questions having to do with what he has testified to on direct examination by Government counsel. You will have a chance later to tell your side of the story, if you care to." Garber has made no showing that the trial judge's remark was prejudicial error. *See, United States ex rel. Miller* v. *Follette*, 397 F.2d 363, 367 (2d Cir. 1968), *cert. denied*, 393 U.S. 1039 (1969). Throughout the trial, the trial judge sought to protect Garber's constitutional rights, and, indeed, he helped him on various occasions to frame proper questions.

Appellant Kaufman contends that the trial judge erred in striking the testimony of New York Supreme Court Justice Louis B. Heller, his principal character witness. However, Justice Heller was unable to testify as to Kaufman's reputation in the community. He testified only that he knew the appellant and his family, had seen him socially, and that the appellant made "a very good impression" on him. He did not testify as to the community in which Kaufman lived or the circles in which he moved, and hence could not speak with authority as to his reputation in the community. *See, Michelson* v. *United States*, 335 U.S. 469, 478 (1948), 3 Wigmore, Evidence, §691 at 17 (3d ed. 1940).

Appellant Garber complains that his Fifth Amendment privilege against self incrimination was denied him when the District Court ordered the production of his noncorporate business records pursuant to a Grand Jury subpoena. He had discontinued his business prior to the issuance of the subpoena. As a registered broker-dealer,

Garber was required by S.E.C. regulations to make and keep the records in question so that the same would be available for inspection and examination, and the protection of the Fifth Amendment does not apply. *Shapiro* v. *United States*, 337 U.S. 1, 32 (1948); *see, United States* v. *Pine Valley Poultry Distributors Corp.*, 187 F. Supp. 455, 457 (S.D.N.Y. 1960).

Appellant Burns contends that he was prejudiced by the trial judge's refusal to allow him to go to trial with defendant Seigenfeld's former lawyer. Seigenfeld's lawyer moved to disqualify his predecessor from representing Burns at the trial or, in the alternative, for a severance of Seigenfeld. The lawyer opposed the motion and later sought a writ of mandamus directing Judge Tyler to permit him to continue as Burns' attorney—which was denied by the Court of Appeals (*Burns* v. *Tyler*, Docket No. 33376, March 21, 1969). The trial judge was well within his discretion in directing Burns to obtain another lawyer in view of the possible conflict of interest between Burns and Seigenfeld. *See, Consolidated Theatres* v. *Warner Bros. Circuit Management Corp.*, 216 F.2d 920 (2d Cir. 1954); *T. C. Theater Corp.* v. *Warner Bros. Pictures, Inc.*, 113 F. Supp. 265 (S.D.N.Y. 1953). Indeed, the wisdom of this exercise of discretion was demonstrated by the acquittal of Seigenfeld and the conviction of Burns.

Burns also contends that since he was acting as principal and not as broker in the sale of the Donbar stock, he had no duty to disclose to customers the cash payments which he was receiving. (*See, United States* v. *Bilotti*, 380 F.2d 649, 657 n. 17 (2d Cir.), *cert. denied*, 389 U.S. 944 (1967); *United States* v. *Hayutin*, 398 F.2d 944, 949 (2d Cir.), *cert. denied*, 393 U.S. 961 (1968).) However, the receipt of these cash payments and the failure to disclose

their receipt to customers was circumstantial evidence to be considered by the jury in determining whether or not Burns was a member of the conspiracy to sell the Donbar stock through the use of manipulative and unlawful devices.

Garber claims that his participation in the conspiracy terminated on June 3, 1963, on the ground that after that date he no longer bought Donbar stock but, on the contrary, was selling it—which he says is "evidence that the conspiracy had failed. *See, Fishwick* v. *United States*, 329 U.S. 211, 91 L.Ed. 196, 200." He therefore contends that the statute of limitations had run as to him. However, there is no evidence from which the jury could have concluded that Garber affirmatively withdrew from the conspiracy on or before June 3, and he therefore remained tied into the conspiracy with respect to overt acts committed by other members of the conspiracy after that date.[2] Moreover, the evidence showed that Garber's activities in supervising the distribution of the Donbar stock continued after June 3.

The remaining allegations of error require no comment, and the conviction of the appellants is affirmed.

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2. The trial judge had originally charged the jury that they must find at least one overt act was committed prior to June 3. After this was brought to his attention, he corrected his charge and instructed the jury that "at least one of the overt acts [was] allegedly committed on or after June 3, 1963." The trial judge told the jury that June 3, 1963 was the cutoff date for the statute of limitations and that it was for this reason that the jury must find that at least one of the overt acts took place on or after that date.

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In the Supreme Court of the United States

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OCTOBER TERM, 1970

IRVING GARBER, PETITIONER

v.

UNITED STATES OF AMERICA

ALAN FLORES, PETITIONER

v.

UNITED STATES OF AMERICA

PAUL M. KAUFMAN, PETITIONER

v.

UNITED STATES OF AMERICA

STEVEN C. BURNS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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